

**BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA**

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<b>APPLICATION TO CHANGE WATER RIGHT NO. 42M 30159218 BY DUANE ULLMAN</b>	}	<b>PRELIMINARY DETERMINATION TO GRANT CHANGE</b>
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On December 21, 2022, Duane Ullman (Applicant) submitted Application to Change Water Right, Additional Stock Tanks, No. 42M 30159218 to change Water Right Claim No. 42M 30133536 to the Glasgow Regional Office of the Department of Natural Resources and Conservation (Department or DNRC). The Department published receipt of the Application on its website. The Department sent Applicant a deficiency letter under §85-2-302, Montana Code Annotated (MCA), dated January 10, 2023. The Applicant responded by submitting additional information in a meeting with the Department on January 25, 2023. The Application was determined to be correct and complete as of January 31, 2023.

An Environmental Assessment for this Application was completed on February 1, 2023.

**INFORMATION**

The Department considered the following information submitted by the Applicant, which is contained in the administrative record.

Application as filed:

- Application to Change Water Right—Additional Stock Tanks, Form 606 ST
- Attachments
- Maps: 2004 NRCS aerial photos showing the existing point of diversion, place of use, proposed additional stock tanks, and proposed pipelines.

Information Received after Application Was Filed

- Detailed narrative on the adequate diversion means and operation, submitted in the January 25, 2023 meeting.

Information within the Department's Possession/Knowledge

- Information contained in the active file of Water Right No. 42M 30133536

- Environmental Assessment dated February 1, 2023 by DNRC Water Resource Specialist Lih-An Yang

The Department has fully reviewed and considered the evidence and argument submitted in this Application and preliminarily determines the following pursuant to the Montana Water Use Act (Title 85, chapter 2, part 3, part 4, MCA).

## **WATER RIGHTS TO BE CHANGED**

### **FINDINGS OF FACT**

1. Applicant seeks to add five stock tanks to Water Right No. 42M 30133536. Water Right No. 42M 30133536 diverts 25 GPM from a well for stock use with a priority date of August 12, 1969. The period of use and the period of diversion are January 1 to December 31 for up to 120 animal units (AU). The volume is limited to the amount of water consumptively used for stock watering purposes at the rate of 30 gallons per day (GPD) per AU. The existing point of diversion and one stock tank are located in SWNWNE Sec 29, T20N, R60E, Richland County, approximately 18 miles south of Sidney, MT.

Table 1: Elements of Water Right No. 42M 30133536

<b>FLOW</b>	<b>VOLUME</b>	<b>PURPOSE</b>	<b>PERIOD OF USE</b>	<b>PLACE OF USE 1 STOCK TANK</b>	<b>POINT OF DIVERSION</b>	<b>PRIORITY DATE</b>
25 GPM	The amount put to historical and beneficial use; no decreed volume	Stock 120 AU	1/1-12/31	SWNWNE Sec 29, T20N, R60E, Richland County	SWNWNE Sec 29, T20N, R60E, Richland County	8/12/1969

2. The Applicant is the sole owner of Water Right No. 42M 30133536. Water Right No. 42M 30133536 does not have a supplemental water right, and has not had any previous change authorization.

## **CHANGE PROPOSAL**

### **FINDINGS OF FACT**

3. The Applicant is proposing to add five stock tanks to Water Right No. 42M 30133536. A total of one well and six stock tanks will be in the appropriation after the proposed change. The

Applicant will continue to use the existing well and tank. The Applicant proposes to continue operating the well at the historic flow rate (25 GPM) and historic diverted volume year-round for up to 120 AU.

4. Under the proposed change authorization, five additional stock tanks will be added in the following places of use:

Two tanks in NENWSE Sec 29, T20N, R60E, Richland County

One tank in SWSWSE Sec 20, T20N, R60E, Richland County

Two tanks in NWSWNE, Sec 20, T20N, R60E, Richland County

5. The Applicant's objectives of adding five stock tanks are to ensure reliable water supply for the livestock and to manage grazing pasture rotation. The NRCS assisted with the design and installation of the livestock pipelines.

### **CHANGE CRITERIA**

6. The Department is authorized to approve a change if the applicant meets its burden to prove the applicable § 85-2-402, MCA, criteria by a preponderance of the evidence. Matter of Royston, 249 Mont. 425, 429, 816 P.2d 1054, 1057 (1991); Hohenlohe v. DNRC, 2010 MT 203, ¶¶ 33, 35, and 75, 357 Mont. 438, 240 P.3d 628 (an applicant's burden to prove change criteria by a preponderance of evidence is "more probably than not."); Town of Manhattan v. DNRC, 2012 MT 81, ¶8, 364 Mont. 450, 276 P.3d 920. Under this Preliminary Determination, the relevant change criteria in §85-2-402(2), MCA, are:

(2) Except as provided in subsections (4) through (6), (15), (16), and (18) and, if applicable, subject to subsection (17), the department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are met:

(a) The proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued under part 3.

(b) The proposed means of diversion, construction, and operation of the appropriation works are adequate, except for: (i) a change in appropriation right for instream flow pursuant to 85-2-320 or 85-2-436; (ii) a temporary change in appropriation right for instream flow pursuant to 85-2-408; or (iii) a change in appropriation right pursuant to 85-2-420 for mitigation or marketing for mitigation.

(c) The proposed use of water is a beneficial use.

(d) The applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use or, if the proposed change involves a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water. This subsection (2)(d) does not apply to: (i) a change in appropriation right for instream flow pursuant to 85-2-320 or 85-2-436; (ii) a temporary change in appropriation right for instream flow pursuant to 85-2-408; or (iii) a change in appropriation right pursuant to 85-2-420 for mitigation or marketing for mitigation.

7. The evaluation of a proposed change in appropriation does not adjudicate the underlying right(s). The Department's change process only addresses the water right holder's ability to make a different use of that existing right. *E.g., Hohenlohe*, at ¶¶ 29-31; *Town of Manhattan*, at ¶8; *In the Matter of Application to Change Appropriation Water Right No.41F-31227 by T-L Irrigation Company* (DNRC Final Order 1991).

## **HISTORIC USE AND ADVERSE EFFECT**

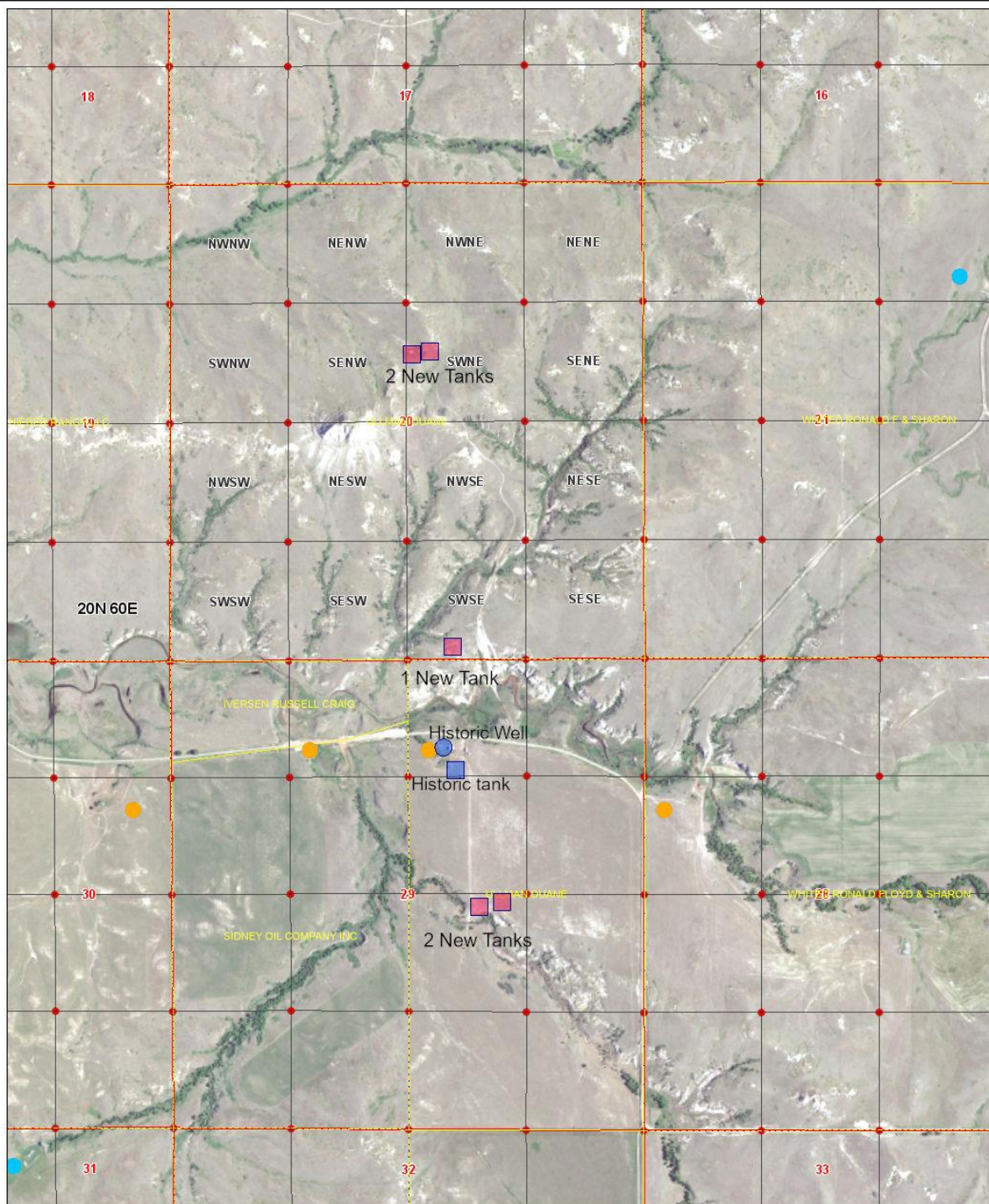
### **FINDINGS OF FACT - Historic Use**

8. Per ARM 36.12.1902(1)(a), historic information for a Statement of Claim must be described as it was used prior to July 1, 1973. The well historically diverted 25 GPM to supply one stock tank for 120 AU year round. The DNRC adjudication standard for livestock use for a Statement of Claim is 30 gallons per day per AU, which equates to 4.03 AF per year. The Department has determined that stock use is 100% consumptive; therefore, historic diverted volume also equals historic consumptive volume of 4.03 AF per year (30 gallons/day/AU x 365 days x 120 AU divided by 325,851 gallons/AF).

Table 2: Historic use for Water Right No. 42M 30133536

Priority Date	Flow Rate	Purpose	Period of Use	Diverted Volume	Consumed Volume	Place of Use	Point of Diversion
8/12/1969	25 GPM	1 stock tank for 120 AU	1/1-12/31	4.03 AF	4.03 AF	SWNWNE Sec 29, T20N, R60E, Richland County	SWNWNE Sec 29, T20N, R60E, Richland County

Figure 1. Historic and Proposed Use, ULLMAN CHANGE APPLICATION 42M 30159218



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Points  
 Override 1  
 Override 2  
 Override 3  
 Active Water Rights (Points of Diversion)  
 SURFACE  
 GROUNDWATER  
 Cadastral Parcels

DNRC Basins  
 PLSS Second Division  
 Aliquot Part  
 Remainder Aliquot Part  
 Government Lot  
 Unnumbered Lot  
 PLSS First Division  
 Section  
 Protracted Block  
 PLSS Township  
 PLSS Meandered Water  
 PLSS Special Survey  
 PLSS Point  
 2021 Aerial Photos  
 Red: Band\_1  
 Green: Band\_2

1:18,056  
 0 0.13 0.25 0.5 mi  
 0 0.23 0.45 0.9 km

Bureau of Land Management, Esri Canada, Esri, HERE, Garmin, INCREMENT P, USGS, METI/NASA, EPA, USDA

**FINDINGS OF FACT – Adverse Effect**

9. Water Right No. 42M 30133536 was filed for one well and one stock tank serving 120 AU from January 1 to December 31 with a flow rate of 25 GPM up to 4.03 AF. The diverted volume of 4.03 AF is within the DNRC standards for the beneficial stock use. Under the proposed change, no additional animal units will be grazed and the flow rate of the well will remain the same. The place of use will be spread out with five additional stock tanks. Therefore, the proposed application will not exceed the historic consumptive volume and historic diverted volume of 4.03 AF.

10. Table 3: Summary of the proposed change in Application No. 42M 30159218

Priority Date	Flow Rate	Purpose	Diverted Volume	Consumed Volume	Place of Use	Point of Diversion
8/12/1969	25 GPM	1 stock tank for 120 AU	4.03 AF	4.03 AF	SWNWNE Sec 29, T20N, R60E  NENWSE Sec 29, T20N, R60E  SWSWSE Sec 20, T20N, R60E  NWSWNE, Sec 20, T20N, R60E  Richland County	SWNWNE Sec 29, T20N, R60E, Richland County

11. The Applicant is the sole owner of this water right and the place of use.

12. The stock tanks are equipped with float switch and valve assembly to control flow into the new tanks. If a call is made, the Applicant has the ability to stop flow with shut-off valves and cease pumping to the additional tanks.

**BENEFICIAL USE**

**FINDINGS OF FACT**

13. The existing water right is for livestock use, which is a recognized beneficial use by the Department. §85-2-102(5)(a), MCA.

14. By adding five stock tanks, the Applicant will be able to water the livestock more reliably and manage grazing rotation more effectively.

15. This groundwater right has historically been diverted at a flow rate of 25 GPM to supply a volume of water up to 4.03 AF for 120 AU year-round. This volume is within DNRC standards and will not be exceeded by the proposed change. Under the change authorization, the well will continue to pump at the same flow rate, and six stock tanks will be used to supply water for 120 AU year-round. The Department finds that the proposed and historic diverted volume of 4.03 AF is adequate to support this beneficial use.

### **ADEQUATE DIVERSION**

#### **FINDINGS OF FACT**

16. The point of diversion is a well located in SWNWNE Sec 29, T20N, R60E, Richland County. The well was completed in 1969 to a depth of 135 feet, with a static water level of 35 ft. A 3/4 HP submersible pump brings water 20 feet east to a pressure tank in a well pit 7 feet deep. Two pipelines, each with a shut-off ball valve, will exit the well pit.

17. The existing south line is a 1.25-inch HDPE pipe buried 7 feet deep and runs 100 feet south to the existing 1000-gallon galvanized tank. From this tank, the line is extended under the proposed change authorization 1,800 feet south to a stop-and-waste valve. Thirty feet southeast of the valve is an additional 1000-gallon tank. Twenty feet further southeast is another 1000-gallon tank. Both tanks are located in NENWSE Sec 29, T20N, R60E, Richland County. Both have a ball valve and float switch.

18. A north line is also added under the proposed change authorization. It is a 1.25-inch HDPE pipeline buried 7 feet deep. It runs 900 feet north to a T-junction where it branches off to the northwest for 500 feet to a stop-and-waste valve. Twenty feet further west is a proposed 1000-gallon tank located in SWSWSE Sec 20, T20N, R60E, Richland County. This tank also has ball valve and float assembly.

19. From the T-junction, the main line heads north 1,500 feet to a stop-and-waste valve. Four hundred feet further north is another stop-and-waste valve, and 1,600 feet further north the main line ends at the stop-and-waste valve for the two proposed 2000-gallon tanks. The two tanks are

just 30 feet northwest of the valve, located in NWSWNE, Sec 20, T20N, R60E, Richland County. Each tank has a ball valve as well as a shut-off float switch. A 50-foot diameter circular corral surrounds the stock tanks. The corral is made of three 16-foot metal gates, leading out to each of the three grazing pastures. The Applicant rests one pasture per year in the grazing rotation.

20. The Department finds that the means of diversion are adequate for diverting the requested amount.

## **POSSESSORY INTEREST**

### **FINDINGS OF FACT**

21. The applicant signed the affidavit on the application form affirming the applicant has possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

## **CONCLUSIONS OF LAW**

### **HISTORIC USE AND ADVERSE EFFECT**

22. Montana's change statute codifies the fundamental principles of the Prior Appropriation Doctrine. Sections 85-2-401 and -402(1)(a), MCA, authorize changes to existing water rights, permits, and water reservations subject to the fundamental tenet of Montana water law that one may change only that to which he or she has the right based upon beneficial use. A change to an existing water right may not expand the consumptive use of the underlying right or remove the well-established limit of the appropriator's right to water actually taken and beneficially used. An increase in consumptive use constitutes a new appropriation and is subject to the new water use permit requirements of the MWUA. McDonald v. State, 220 Mont. 519, 530, 722 P.2d 598, 605 (1986)(beneficial use constitutes the basis, measure, and limit of a water right); Featherman v. Hennessy, 43 Mont. 310, 316-17, 115 P. 983, 986 (1911)(increased consumption associated with expanded use of underlying right amounted to new appropriation rather than change in use); Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067, 1072-74 (1940)(appropriator may not expand a water right through the guise of a change – expanded use constitutes a new use with a new priority date junior to intervening water uses); Allen v. Petrick, 69 Mont. 373, 222 P. 451(1924)(“quantity of water which may be claimed lawfully under a prior appropriation is limited



to that quantity within the amount claimed which the appropriator has needed, and which within a reasonable time he has actually and economically applied to a beneficial use. . . . it may be said that the principle of beneficial use is the one of paramount importance . . . The appropriator does not own the water. He has a right of ownership in its use only”); Town of Manhattan, at ¶ 10 (an appropriator’s right only attaches to the amount of water actually taken and beneficially applied); Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, Pg. 9 (2011)(the rule that one may change only that to which it has a right is a fundamental tenet of Montana water law and imperative to MWUA change provisions); In the Matter of Application to Change a Water Right No. 411 30002512 by Brewer Land Co, LLC, DNRC Proposal For Decision and Final Order (2004).<sup>1</sup>

23. Sections 85-2-401(1) and -402(2)(a), MCA, codify the prior appropriation principles that Montana appropriators have a vested right to maintain surface and ground water conditions substantially as they existed at the time of their appropriation; subsequent appropriators may insist that prior appropriators confine their use to what was actually appropriated or necessary for their originally intended purpose of use; and, an appropriator may not change or alter its use in a manner that adversely affects another water user. Spokane Ranch & Water Co. v. Beatty, 37 Mont. 342, 96 P. 727, 731 (1908); Quigley, 110 Mont. at 505-11, 103 P.2d at 1072-74; Matter of Royston, 249 Mont. at 429, 816 P.2d at 1057; Hohenlohe, at ¶¶43-45.<sup>2</sup>

24. The cornerstone of evaluating potential adverse effect to other appropriators is the determination of the “historic use” of the water right being changed. Town of Manhattan, at ¶10 (recognizing that the Department’s obligation to ensure that change will not adversely affect other water rights requires analysis of the actual historic amount, pattern, and means of water

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<sup>1</sup> DNRC decisions are available at:

[http://www.dnrc.mt.gov/wrd/water\\_rts/hearing\\_info/hearing\\_orders/hearingorders.asp](http://www.dnrc.mt.gov/wrd/water_rts/hearing_info/hearing_orders/hearingorders.asp)

<sup>2</sup> See also Holmstrom Land Co., Inc., v. Newlan Creek Water District, 185 Mont. 409, 605 P.2d 1060 (1979); Lokowich v. Helena, 46 Mont. 575, 129 P. 1063(1913); Thompson v. Harvey, 164 Mont. 133, 519 P.2d 963 (1974)(plaintiff could not change his diversion to a point upstream of the defendants because of the injury resulting to the defendants); McIntosh v. Graveley, 159 Mont. 72, 495 P.2d 186 (1972)(appropriator was entitled to move his point of diversion downstream, so long as he installed measuring devices to ensure that he took no more than would have been available at his original point of diversion); Head v. Hale, 38 Mont. 302, 100 P. 222 (1909)(successors of the appropriator of water appropriated for placer mining purposes cannot so change its use as to deprive lower appropriators of their rights, already acquired, in the use of it for irrigating purposes); and, Gassert v. Noyes, 18 Mont. 216, 44 P. 959(1896)(change in place of use was unlawful where reduced the amount of water in the source of supply available which was subject to plaintiff’s subsequent right).

use). A change applicant must prove the extent and pattern of use for the underlying right proposed for change through evidence of the historic diverted amount, consumed amount, place of use, pattern of use, and return flow because a statement of claim, permit, or decree may not include the beneficial use information necessary to evaluate the amount of water available for change or potential for adverse effect.<sup>3</sup> A comparative analysis of the historic use of the water right to the proposed change in use is necessary to prove the change will not result in expansion of the original right, or adversely affect water users who are entitled to rely upon maintenance of conditions on the source of supply for their water rights. Quigley, 103 P.2d at 1072-75 (it is necessary to ascertain historic use of a decreed water right to determine whether a change in use expands the underlying right to the detriment of other water user because a decree only provides a limited description of the right); Royston, 249 Mont. at 431-32, 816 P.2d at 1059-60 (record could not sustain a conclusion of no adverse effect because the applicant failed to provide the Department with evidence of the historic diverted volume, consumption, and return flow); Hohenlohe, at ¶44-45; Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, Pgs. 11-12 (proof of historic use is required even when the right has been decreed because the decreed flow rate or volume establishes the maximum appropriation that may be diverted, and may exceed the historical pattern of use, amount diverted or amount consumed through actual use); Matter of Application For Beneficial Water Use Permit By City of Bozeman, *Memorandum*, Pgs. 8-22 (Adopted by DNRC *Final Order* January 9, 1985)(evidence of historic use must be compared to the proposed change in use to give effect to the implied limitations read into every decreed right that an appropriator has no right to expand his appropriation or change his use to the detriment of juniors).<sup>4</sup>

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<sup>3</sup>A claim only constitutes *prima facie* evidence for the purposes of the adjudication under § 85-2-221, MCA. The claim does not constitute *prima facie* evidence of historical use in a change proceeding under §85-2-402, MCA. For example, most water rights decreed for irrigation are not decreed with a volume and provide limited evidence of actual historic beneficial use. §85-2-234, MCA

<sup>4</sup> Other western states likewise rely upon the doctrine of historic use as a critical component in evaluating changes in appropriation rights for expansion and adverse effect: Pueblo West Metropolitan District v. Southeastern Colorado Water Conservancy District, 717 P.2d 955, 959 (Colo. 1986)(“[O]nce an appropriator exercises his or her privilege to change a water right ... the appropriator runs a real risk of requantification of the water right based on actual historical consumptive use. In such a change proceeding a junior water right ... which had been strictly administered throughout its existence would, in all probability, be reduced to a lesser quantity because of the relatively limited actual historic use of the right.”); Santa Fe Trail Ranches Property Owners Ass'n v. Simpson, 990 P.2d 46, 55 -57 (Colo., 1999); Farmers Reservoir and Irr. Co. v. City of Golden, 44 P.3d 241, 245 (Colo. 2002)(“We [Colorado Supreme Court] have stated time and again that the need for security and predictability in the prior appropriation system dictates that holders of vested water rights are entitled to the continuation of stream conditions

25. An applicant must also analyze the extent to which a proposed change may alter historic return flows for purposes of establishing that the proposed change will not result in adverse effect. The requisite return flow analysis reflects the fundamental tenant of Montana water law that once water leaves the control of the original appropriator, the original appropriator has no right to its use and the water is subject to appropriation by others. E.g., Hohenlohe, at ¶44; Rock Creek Ditch & Flume Co. v. Miller, 93 Mont. 248, 17 P.2d 1074, 1077 (1933); Newton v. Weiler, 87 Mont. 164, 286 P. 133(1930); Popham v. Holloron, 84 Mont. 442, 275 P. 1099, 1102 (1929); Galiger v. McNulty, 80 Mont. 339, 260 P. 401 (1927); Head v. Hale, 38 Mont. 302, 100 P. 222 (1909); Spokane Ranch & Water Co., 37 Mont. at 351-52, 96 P. at 731; Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185; In the Matter of Application for Change Authorization No. G (W)028708-411 by Hedrich/Straugh/Ringer, DNRC Final Order (Dec. 13, 1991); In the Matter of Application for Change Authorization No. G(W)008323-G76l By Starkel/Koester, DNRC Final Order (Apr. 1, 1992); In the Matter of Application to Change a Water Right No. 41l 30002512 by Brewer Land Co, LLC, DNRC Proposal For Decision and Final Order (2004); Admin. R.M. 36.12.101(56)(Return flow - that part of a diverted flow which is not consumed by the appropriator and returns underground to its original source or another source of water - is not part of a water right and is subject to appropriation by subsequent water users).<sup>5</sup>

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as they existed at the time they first made their appropriation); Application for Water Rights in Rio Grande County, 53 P.3d 1165, 1170 (Colo. 2002); Wyo. Stat. § 41-3-104 (When an owner of a water right wishes to change a water right ... he shall file a petition requesting permission to make such a change .... The change ... may be allowed provided that the quantity of water transferred ... shall not exceed the amount of water historically diverted under the existing use, nor increase the historic rate of diversion under the existing use, nor increase the historic amount consumptively used under the existing use, nor decrease the historic amount of return flow, nor in any manner injure other existing lawful appropriators.); Basin Elec. Power Co-op. v. State Bd. of Control, 578 P.2d 557, 564 -566 (Wyo,1978) (a water right holder may not effect a change of use transferring more water than he had historically consumptively used; regardless of the lack of injury to other appropriators, the amount of water historically diverted under the existing use, the historic rate of diversion under the existing use, the historic amount consumptively used under the existing use, and the historic amount of return flow must be considered.)

<sup>5</sup> The Montana Supreme Court recently recognized the fundamental nature of return flows to Montana's water sources in addressing whether the Mitchell Slough was a perennial flowing stream, given the large amount of irrigation return flow which feeds the stream. The Court acknowledged that the Mitchell's flows are fed by irrigation return flows available for appropriation. Bitterroot River Protective Ass'n, Inc. v. Bitterroot Conservation Dist. 2008 MT 377, ¶¶ 22, 31, 43, 346 Mont. 508, ¶¶ 22, 31,43, 198 P.3d 219, ¶¶ 22, 31,43(citing Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185).

26. Although the level of analysis may vary, analysis of the extent to which a proposed change may alter the amount, location, or timing return flows is critical in order to prove that the proposed change will not adversely affect other appropriators who rely on those return flows as part of the source of supply for their water rights. Royston, 249 Mont. at 431, 816 P.2d at 1059-60; Hohenlohe, at ¶¶ 45-6 and 55-6; Spokane Ranch & Water Co., 37 Mont. at 351-52, 96 P. at 731. Noted Montana Water Law scholar Al Stone explained that the water right holder who seeks to change a water right is unlikely to receive the full amount claimed or historically used at the original place of use due to reliance upon return flows by other water users. Montana Water Law, Albert W. Stone, Pgs. 112-17 (State Bar of Montana 1994).

27. In Royston, the Montana Supreme Court confirmed that an applicant is required to prove lack of adverse effect through comparison of the proposed change to the historic use, historic consumption, and historic return flows of the original right. 249 Mont. at 431, 816 P.2d at 1059-60. More recently, the Montana Supreme Court explained the relationship between the fundamental principles of historic beneficial use, return flow, and the rights of subsequent appropriators as they relate to the adverse effect analysis in a change proceeding in the following manner:

The question of adverse effect under §§ 85-2-402(2) and -408(3), MCA, implicates return flows. A change in the amount of return flow, or to the hydrogeologic pattern of return flow, has the potential to affect adversely downstream water rights. There consequently exists an inextricable link between the “amount historically consumed” and the water that re-enters the stream as return flow. . . .

An appropriator historically has been entitled to the greatest quantity of water he can put to use. The requirement that the use be both beneficial and reasonable, however, proscribes this tenet. This limitation springs from a fundamental tenet of western water law—that an appropriator has a right only to that amount of water historically put to beneficial use—developed in concert with the rationale that each subsequent appropriator “is entitled to have the water flow in the same manner as when he located,” and the appropriator may insist that prior appropriators do not affect adversely his rights.

This fundamental rule of Montana water law has dictated the Department’s determinations in numerous prior change proceedings. The Department claims that historic consumptive use, as quantified in part by return flow analysis, represents a key element of proving historic beneficial use.

We do not dispute this interrelationship between historic consumptive use, return flow, and the amount of water to which an appropriator is entitled as limited by his past beneficial use.

Hohenlohe, at ¶¶ 42-45 (internal citations omitted).

28. The Department's rules reflect the above fundamental principles of Montana water law and are designed to itemize the type evidence and analysis required for an applicant to meet its burden of proof. Admin.R.M. 36.12.1901 through 1903. These rules forth specific evidence and analysis required to establish the parameters of historic use of the water right being changed. Admin.R.M. 36.12.1901 and 1902. The rules also outline the analysis required to establish a lack of adverse effect based upon a comparison of historic use of the water rights being changed to the proposed use under the changed conditions along with evaluation of the potential impacts of the change on other water users caused by changes in the amount, timing, or location of historic diversions and return flows. Admin.R.M. 36.12.1901 and 1903.

29. Applicant seeks to change existing water rights represented by its Water Right Claims. The "existing water rights" in this case are those as they existed prior to July 1, 1973, because with limited exception, no changes could have been made to those rights after that date without the Department's approval. Analysis of adverse effect in a change to an "existing water right" requires evaluation of what the water right looked like and how it was exercised prior to July 1, 1973. In McDonald v. State, the Montana Supreme Court explained:

The foregoing cases and many others serve to illustrate that what is preserved to owners of appropriated or decreed water rights by the provision of the 1972 Constitution is what the law has always contemplated in this state as the extent of a water right: such amount of water as, by pattern of use and means of use, the owners or their predecessors put to beneficial use. . . . the Water Use Act contemplates that all water rights, regardless of prior statements or claims as to amount, must nevertheless, to be recognized, pass the test of historical, unabandoned beneficial use. . . . To that extent only the 1972 constitutional recognition of water rights is effective and will be sustained.

220 Mont. at 529, 722 P.2d at 604; see also Matter of Clark Fork River Drainage Area, 254 Mont. 11, 17, 833 P.2d 1120 (1992).

30. Water Resources Surveys were authorized by the 1939 legislature. 1939 Mont. Laws Ch. 185, § 5. Since their completion, Water Resources Surveys have been invaluable evidence in water right disputes and have long been relied on by Montana courts. In re Adjudication of Existing Rights to Use of All Water in North End Subbasin of Bitterroot River Drainage Area in

Ravalli and Missoula Counties, 295 Mont. 447, 453, 984 P.2d 151, 155 (1999)(Water Resources Survey used as evidence in adjudicating of water rights); Wareing v. Schreckendgust, 280 Mont. 196, 213, 930 P.2d 37, 47 (1996)(Water Resources Survey used as evidence in a prescriptive ditch easement case); Olsen v. McQueary, 212 Mont. 173, 180, 687 P.2d 712, 716 (1984) (judicial notice taken of Water Resources Survey in water right dispute concerning branches of a creek).

31. Based upon the Applicant's evidence of historic use, the Applicant has proven by a preponderance of the evidence the historic use of Water Right No. 42M 30133536 is 4.03 AF diverted volume and 25 GPM flow rate with a consumptive use of 4.03 AF. (FOF No.8)

32. Based upon the Applicant's comparative analysis of historic water use to water use under the proposed change, the Applicant has proven that the proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued. §85-2-402(2)(b), MCA. (FOF Nos. 9—12)

### BENEFICIAL USE

33. A change applicant must prove by a preponderance of the evidence the proposed use is a beneficial use. §§85-2-102(5) and -402(2)(c), MCA. Beneficial use is and has always been the hallmark of a valid Montana water right: "[T]he amount actually needed for beneficial use within the appropriation will be the basis, measure, and the limit of all water rights in Montana . . ." McDonald, 220 Mont. at 532, 722 P.2d at 606. The analysis of the beneficial use criterion is the same for change authorizations under §85-2-402, MCA, and new beneficial permits under §85-2-311, MCA. Admin.R.M. 36.12.1801. The amount of water that may be authorized for change is limited to the amount of water necessary to sustain the beneficial use. E.g., Bitterroot River Protective Association v. Siebel, *Order on Petition for Judicial Review*, Cause No. BDV-2002-519, Montana First Judicial District Court (2003) (*affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518); Worden v. Alexander, 108 Mont. 208, 90 P.2d 160 (1939); Allen v. Petrick, 69 Mont. 373, 222 P. 451(1924); Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, *Order Affirming DNRC Decision*, Pg. 3 (2011)(citing BRPA v. Siebel,

2005 MT 60, and rejecting applicant's argument that it be allowed to appropriate 800 acre-feet when a typical year would require 200-300 acre-feet); Toohey v. Campbell, 24 Mont. 13, 60 P. 396 (1900)("The policy of the law is to prevent a person from acquiring exclusive control of a stream, or any part thereof, not for present and actual beneficial use, but for mere future speculative profit or advantage, without regard to existing or contemplated beneficial uses. He is restricted in the amount that he can appropriate to the quantity needed for such beneficial purposes."); §85-2-312(1)(a), MCA (DNRC is statutorily prohibited from issuing a permit for more water than can be beneficially used).

34. Applicant proposes to use water for stock which is a recognized beneficial use. §85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence stock is a beneficial use and that 4.03 acre-feet of diverted volume and 25 GPM flow rate of water requested is the amount needed to sustain the beneficial use and is within the standards set by DNRC Rule. §85-2-402(2)(c), MCA (FOF Nos. 13—15)

#### ADEQUATE MEANS OF DIVERSION

35. Pursuant to §85-2-402 (2)(b), MCA, the Applicant must prove by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate. This codifies the prior appropriation principle that the means of diversion must be reasonably effective for the contemplated use and may not result in a waste of the resource. Crowley v. 6<sup>th</sup> Judicial District Court, 108 Mont. 89, 88 P.2d 23 (1939); In the Matter of Application for Beneficial Water Use Permit No. 41C-11339900 by Three Creeks Ranch of Wyoming LLC (DNRC Final Order 2002).

36. Pursuant to §85-2-402 (2)(b), MCA, applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. (FOF Nos. 16—20)

#### POSSESSORY INTEREST

37. Pursuant to §85-2-402(2)(d), MCA, the Applicant must prove by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the

possessory interest, in the property where the water is to be put to beneficial use. See also Admin.R.M. 36.12.1802.

38. The Applicant has proven by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. (FOF No. 21)

### **PRELIMINARY DETERMINATION**

Subject to the terms and analysis in this Preliminary Determination Order, the Department preliminarily determines that this Application to Change Water Right No. 42M 30159218 should be GRANTED subject to the following.

The Department has determined that the Applicant may add five stock tanks located at the following places of use:

Two tanks in NENWSE Sec 29, T20N, R60E, Richland County

One tank in SWSWSE Sec 20, T20N, R60E, Richland County

Two tanks in NWSWNE, Sec 20, T20N, R60E, Richland County

The point of diversion and original place of use on Water Right No. 42M 30133536 will remain in SWNWNE Sec 29, T20N, R60E, Richland County. The period of use and period of diversion are January 1 to December 31. The flow rate is 25 GPM and the diverted volume is 4.03 AF per year for stock use.

### **NOTICE**

This Department will provide public notice of this Application and the Department's Preliminary Determination to Grant pursuant to §85-2-307, MCA. The Department will set a deadline for objections to this Application pursuant to §§85-2-307, and -308, MCA. If this Application receives a valid objection, it will proceed to a contested case proceeding pursuant to



Title 2 Chapter 4 Part 6, MCA, and §85-2-309, MCA. If this Application receives no valid objection or all valid objections are unconditionally withdrawn, the Department will grant this Application as herein approved. If this Application receives a valid objection(s) and the valid objection(s) are conditionally withdrawn, the Department will consider the proposed condition(s) and grant the Application with such conditions as the Department decides necessary to satisfy the applicable criteria. E.g., §§85-2-310, -312, MCA.

DATED this 13<sup>th</sup> day of February, 2023.

/Original signed by Todd Netto/  
Todd Netto, Manager  
Glasgow Water Resource Regional Office  
Montana Department of Natural Resources  
and Conservation

**CERTIFICATE OF SERVICE**

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 13<sup>th</sup> day of February, 2023, by first class United States mail.

DUANE ULLMAN  
34787 COUNTY RD 134  
FAIRVIEW, MT 59221

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Glasgow Regional Office, (406) 228-2561